A Review of California Case Law On Judicial Treatment of Self Represented Litigants in the Courtroom

Overview – the Ethical Context

Judges dealing with self represented litigants in the courtroom are subject to two ethical duties that may, at times, conflict. Canon 3B(7) requires a judge to "accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law." Canon 2A requires the judge to "act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary."

Many judges perceive that the actions required to ensure a self represented litigant's "right to be heard" violate the court's duty of impartiality and that the duty of impartiality trumps the duty to ensure a litigant's right to be heard. The American Bar Association Standards Relating to Trial Courts, Standard 2.23 finds no inherent conflict between the two ethical duties:

> **Conduct of Cases Where Litigants Appear Without Counsel. When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial.**
>
> *Commentary*
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> The duty of the courts to make their procedures fair is not limited to appointing counsel for eligible persons who request representation. In many instances, persons who cannot afford counsel are ineligible for appointed counsel; in other cases, persons who can afford counsel, or who are eligible to be provided with counsel, refuse to be represented. . . .
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> All such situations present great difficulties for the court because the court's essential role as an impartial arbiter cannot be performed with the usual confidence that the merits of the case will be fully disclosed through the litigant's presentations. These difficulties are compounded when, as can often be the case, the litigant's capacity even as a lay participant appears limited by gross ignorance, inarticulateness, naivete, or mental disorder. They are especially great when one party is represented by counsel and the other is not, for intervention by the court introduces not only ambiguity and potential conflict in the court's role but also consequent ambiguity in the role of counsel for the party who is represented. Yet it is ultimately the judge's responsibility to see that the merits of a controversy are resolved fairly and justly. Fulfilling that responsibility may require that the court, while remaining neutral in consideration of the merits, assume more than a merely passive role in assuring that the merits are adequately presented.

> The proper scope of the court's responsibility is necessarily an expression of careful exercise of judicial discretion and cannot be fully described by specific formula. . . . . Where litigants represent themselves, the court in the interest of fair determination of the merits should ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigants' presentation of the case. (emphasis supplied)

In early 2006, the American Bar Association took the first steps to clarify this issue in the Model Code of Judicial Conduct itself. The ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct has proposed that Comment 3 to Rule 2.06 (currently Canon 2A on impartiality) be modified as follows:

> *To ensure impartiality and fairness to all parties, a judge must be objective and open-minded, and must not show favoritism to anyone.* ***It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.*** *(Proposed new text in* ***bold****)*

While California appellate decisions do not generally pose the issue in the context of the judge's ethical obligations, the general literature on this topic (on which this chapter has drawn heavily) does.[1]

General principles from California caselaw

A self represented litigant in California has the right "to appear and conduct his own case." *Gray v. Justice's Court of Williams Judicial Township, 18 Cal. App.2d 420, 63 P.2d 1160 (3d Dist., 1937)(dictum).*

The court has a general duty to treat a person representing himself in the same manner as a person represented by counsel.

> A lay person, who is not indigent, and who exercised the privilege of trying his own case must expect and receive the same treatment as if represented by an attorney – no different,

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[1] Cynthia Gray, Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants (American Judicature Society, Des Moines, Iowa 2005); Zorza, "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications," 17 *Georgetown Journal of Legal Ethics* 423 (2004); Albrecht, Greacen, Hough, Zorza, "Judicial Techniques for Cases Involving Self-Represented Litigants," 41 *Judges' Journal* 16 (ABA winter 2003); Minnesota Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants (reprinted in Albrecht, et al, *supra*); *Indiana Advisory Opinion 1-97* (www.in.gov/judiciary/admin/judqual/opinions.html).

> no better, and no worse. *Taylor v. Bell, 21 Cal. App.3d 1002, 1009, 98 Cal.Rptr. 855 (2d Dist., Div. 5, 1971).*[2]

This principle's application is straightforward as it applies to the basic substantive legal principles governing the right to legal relief. The elements required to obtain a judgment and the burden of proof are the same for a self represented litigant as for a litigant represented by counsel. All persons are equal in the eyes of the law.

California case law also applies the "same treatment" principle to the rules of evidence and procedure:

> A litigant has a right to act as his own attorney . . . but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise ignorance is unjustly rewarded. *Doran v. Dreyer, 143 Cal.App.2d 289, 290, 299 P.2d 6611 (1956).*

This rule's application is also straightforward – in part. Inadmissible evidence cannot serve as the basis for awarding relief to a self represented litigant, and a self represented litigant must follow the requirements of the rules of procedure. However, there are three[3] related, countervailing principles that California trial judges must also take into account.

The first is the judiciary's preference to resolve matters on their merits rather than by procedural default.

> It has always been the policy of the courts in California to resolve a dispute on the merits of the case rather than allowing a dismissal on technicality. *Harding v. Collazo, 177 Cal.App.3d 1044,1061, 223 Cal.Rptr. 329 (1986)(Acting P.J. Liu, dissenting).*

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[2] This language was taken originally from a 1932 Arizona Supreme Court decision, *Ackerman v. Southern Arizona Bank & Trust Co., 39 Ariz. 484, 7 P.2d 944.* Only one subsequent case, *Monastero v. Los Angeles Transit Company, 131 Cal.App.2d 156, 280 P.2d 187 (2d Dist., Div. 3, 1955)* discusses whether a self represented litigant had the means to retain counsel. It is fair to say, therefore, that the principle is not limited to self represented litigants with means but rather applies to all self represented litigants – indigent as well as wealthy.

[3] The Supreme Court, in *Rappleyea v. Campbell,* 8 Cal.4th 975, 884 P.2d 126, 35 Cal.Rptr.2d 669 (1994), greatly curtailed the existence of a third exception established in *Pete v. Henderson, 124 Cal.App.2d 487, 491, 269 P.2d 78 (1st Dist. Div. 1, 1954,* that when trial judges have discretion in applying procedural rules, the court is required to take into account a litigant's self represented status in exercising that discretion. In *Rappleyea,* Justice Mosk, writing for the majority, stated that this rule "should very rarely, if ever, be followed." "We make clear that mere self-representation is not a ground for exceptionally lenient treatment." *Supra, at 985.*

This principle requires the judge not to allow procedural irregularities to serve as the basis for precluding a self represented litigant from presenting relevant evidence or presenting a potentially valid defense.

The second is the trial judge's duty to avoid a miscarriage of justice.

> The trial judge has a "duty to see that a miscarriage of justice does not occur through inadvertence." *Lombardi v. Citizens Nat. Trust etc. Bank, 137 Cal App.2d 206, 209, 289 P.2d 8231 (1951).*

This principle reinforces the preference for a decision on the merits.

The third is that treatment equal to that of a represented party requires the court to "make sure that verbal instructions given in court and written notices are clear and understandable by a layperson." *Gamet v. Blanchard, 91 Cal. App.4th 1276, 1284, 111 Cal. Rptr.2d 439, 445 (4th Dist., Div. 3, 2001).* The court explained this requirement in the following paragraph of its opinion:

> There is no reason that a judge cannot take affirmative steps – for example, spending a few minutes editing a letter or minute order from the court – to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. Judges are charged with ascertaining the truth, not just playing the referee. [citation omitted] A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits. [citation omitted] Judges should recognize that a pro per litigant may be prone to misunderstanding court requirements or orders – that happens enough with lawyers – and take at least some care to assure their orders are plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per litigant. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system. *Id., at 1285, 445-446.*

California case law also makes clear that the "same treatment" principle does not prevent trial judges from providing assistance to self represented litigants to enable them to comply with the rules of evidence and procedure.

In *Monastero v. Los Angeles Transit Company, 131 Cal.App.2d 156, 280 P.2d 187 (2d Dist., Div. 3, 1955)* the trial judge "labored long and patiently to convince plaintiff of the folly of conducting a jury case in person, she being untrained in the law. He offered to arrange a continuance in order to enable her to get an attorney for the trial but she was insistent upon her right to represent herself." At the close of the testimony (during which plaintiff thoroughly discredited her own case), the judge ordered opposing counsel to "hand to Miss Monastero instructions that ordinarily would be requested in conjunction with matters of this kind." According to the Court of Appeals, the judge "continued through the trial to assist plaintiff in the presentation of her case, guiding her as to peremptory challenges, assisting her in examining jurors as to cause for challenge, advising her of the right to examine [the defendant], advising efforts to compromise, emphasizing the duty of defendant to exercise the highest degree of care and carefully scrutinizing all proffered instructions." On appeal from the court's judgment rendered on the basis of the jury's verdict in favor of the defendant, plaintiff (at this point represented by counsel) contested the propriety of the court's requiring defendant's attorney to assist plaintiff in the preparation of instructions.

The Court of Appeals, held that plaintiff was in no way prejudiced by the manner in which the instructions were prepared, the appellate court noting that the trial judge prepared and gave two additional instructions on his own motion, both of which were intended to clarify the rights of the plaintiff. The Court of Appeals did not find fault with the extensive assistance provided the plaintiff by the court. Rather, its opinion refers to those efforts with approval, referring to the plaintiff's arguments on appeal that the court had erred in requiring defendant's counsel to assist the plaintiff as "startling."

California appellate courts often recite the "same treatment" principle in affirming a trial judge's discretionary decisions not to provide specific assistance. However, the courts in the same opinions recite, with apparent approval, the steps the trial judge <u>did take</u> to accommodate the special needs of the self represented litigant – treating him or her differently than the court would have, or did, treat a party represented by counsel.

Here are illustrative cases:

In *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles, 137 Cal.App.2d 206, 289 P.2d 823 (2d Dist. Div. 2, 1955),* a self represented plaintiff attempted to present evidence of a claim

against the estate of a deceased. Counsel for the estate objected to the proferred testimony on the grounds of California's "dead man's statute." Counsel also objected to the introduction of a report from a writing expert on the grounds of lack of foundation and hearsay. A nonsuit on the ground of failure of proof was entered. On appeal, the plaintiff argued that the trial judge erred in failing to lend him any assistance in the presentation of his evidence. The Court of Appeals noted the "customary practice" of offering "appropriate suggestions" in cases involving self represented litigants, but held that plaintiff in this case was asking the court to act as counsel for the litigant. Noting that claims against an estate are not easily proved where the "dead man's statute" is involved, the Court of Appeals wrote:

> This case presented difficulty of proof for issues were made not only as to the genuineness of decedent's signature to the document in question and manner in which it was procured but also as to the circumstances under which it was delivered to plaintiff by her, if in fact any delivery was ever made. To explain section 1880, subdivision 3, Code of Civil Procedure, and the decisions construing it to a layman so that he could understand and apply them in the presentation of evidence in a suit on a transaction had with a deceased person, is to forget the difficulty that even some members of the legal profession have in properly presenting competent evidence to prove claims against estates in these circumstances. Such an undertaking would undoubtedly prove abortive and a waste of time. Also, it might well take from the proceeding the appearance of objectivity and impartiality which are so important to public confidence in the administration of justice. <u>This is not a case where a few suggestions on the part of the trial judge would have solved plaintiff's difficulty. Had it been such, the trial judge would undoubtedly have followed the customary practice and offered appropriate suggestions.</u> (Emphasis added)

In *Taylor v. Bell, supra,* a self represented defendant asserted an affirmative defense in an action to recover on five promissory notes. The court called the defendant as its witness and questioned her, followed by cross examination by the plaintiff's attorney. The defendant then called her mother and returned to the stand to testify further on her own behalf. The court then "being of the opinion that defendant should be given full opportunity to produce all available witnesses and evidence she could muster," informed her of her right to subpoena witnesses and inquired how much time she would need. The defendant asked for three weeks and the court adjourned the trial for

that length of time. When the trial resumed, the defendant called and put on seventeen witnesses. She then called an eighteenth witness; plaintiff's counsel informed the court that the witness was out of state on business. After the court "very carefully and meticulously" sought information on the substance and materiality of the witness's purported testimony, the court denied a further continuance on the ground that the requested testimony would not be relevant. After the case was submitted, the judge reconsidered and notified the parties that the submission was vacated and the case set for further hearing to enable the defendant to produce the missing witness. On the date of the further hearing, the court announced that the matter would be continued again and one of the additional witnesses present announced that he would not be available on the new hearing date. The defendant then inquired, "Does that give me the privilege of taking a deposition?" The judge replied, "You will have to ask a lawyer, ma'am." The case was reconvened on the new date, the missing witness and two other witnesses testified, and the case was resubmitted.

The defendant appealed on the grounds that the court erred in continuing the trial *sua sponte*, and in refusing to advise whether she could take the deposition of a witness who would be unavailable to appear. The Court of Appeals, quoting the "same treatment" standard, held that the court had not erred in vacating the submission and continuing the hearing. It further stated that the judge "is not required to act as counsel for [a self represented] party in the presentation of evidence." In the course of affirming the ruling against the defendant, the court's opinion complimented the trial judge on the accommodations the court gave to the defendant. Though the appellate court held that the court did not have the duty to advise the defendant on conducting a deposition, it did not criticize the judge for advising the defendant on the right to issue subpoenas.

In *Nelson v. Gaunt, 125 Cal.App.3d 623, 178 Cal.Rptr. 167 (1st Dist., Div. 2, 1981)*, a self represented defendant complained on appeal that plaintiff's counsel was guilty of misconduct in referring to the defendant as a "monster" and a "lying animal." He claimed that the trial judge had a duty *sua sponte* to prevent the potentially prejudicial misconduct of opposing counsel, thereby excusing him of his failure to preserve the error by objecting. The Court of Appeals recited the many ways in which the trial judge assisted the defendant:

> [T]he court asked and received the cooperation of [plaintiff's] counsel. The court, [defendant and plaintiff's] counsel met each

> day prior to the seating of the jury to discuss anticipated testimony and evidence, and any objections that might be appropriate. On several occasions, the court, in the presence of the jury, reiterated the proper procedure for admission of evidence, and suggested that if [defendant] wished to raise an objection he might do so. On the court's initiative, several admonitions were given to the jury to disregard statements made by witnesses.

The Court of Appeals held that it was not error for the court to have failed to prevent opposing counsel from committing prejudicial misconduct and that the defendant could not raise that claim for the first time on appeal.

In *Foster v. Civil Service Commission of Los Angeles County, 142 Cal.Ap2d 444, 190 Cal.Rptr. 893 (2d Dist, 1983)*, the Court of Appeals cited the "same treatment" rule in an appeal from the Superior Court in which the appellant, proceeding *in propria persona*, failed to provide citations to the trial court record. However, the appellate court then disregarded the rule and examined the entire record for support for the arguments made – treatment that would not have been accorded a party represented by counsel.

In *Harding v. Collazo, 177 Cal.App.3d 1044, 223 Cal.Rptr. 329 (2d District, Div. 3, 1986),* a self represented litigant filed a complaint on July 7, 1983, for a variety of wrongs done to him during his employment by the defendants. On April 13, 1984, the court, on motion of the defendants, held that the complaint failed to state facts sufficient to constitute a cause of action, allowing the plaintiff 30 days to amend. On May 10, 1984, within the 30 days, the plaintiff filed a new complaint, adding two additional defendants. On June 4, the defendants filed a demurrer to the amended complaint. On June 27, 1985, the parties by oral stipulation agreed that plaintiff would file a further amended complaint by August 20th. Plaintiff missed this deadline. The defendants agreed to extend the time for filing to September 10th. On September 18th, the defendants moved to dismiss the first amended complaint. The motion was to be heard on October 26th. On October 19th, an attorney filed an appearance for the plaintiff; he filed an amended complaint on October 22nd. At the October 26th hearing, the trial court dismissed the case with prejudice. On appeal, the Court of Appeals, with one member of the panel dissenting, upheld the judge's exercise of his discretion to enforce the oral stipulation among the parties. However, the court did not criticize the judge for giving the self represented litigant two opportunities

(three if you count the original submission) to submit a legally sufficient complaint.

Allowable assistance to self represented litigants

Listed below are actions of trial judges assisting self represented litigants upheld on appeal and additional actions recited in appellate opinions with apparent approval.

Liberally construing documents filed

California courts generally follow the practice of construing filings in the manner most favorable to self represented litigants and to overlook technical mistakes they may make in pleading.

In *Nelson v. Gaunt, supra,* the Court of Appeals noted that the appellant erroneously stated that he appealed from the verdict and notice of entry of judgment. The court construed the appeal from the notice of entry of judgment as taken from the judgment and dismissed the purported appeal from the verdict.[4]

In *Rappleyea v. Campbell, 8 Cal.4th 975, 884 P.2d 126, 35 Cal.Rptr.2d 669 (1994),* the Supreme Court ruled that the trial court erred in refusing to vacate a default judgment when shown that the clerk of court had given self represented defendants who lived out of state erroneous information concerning the required filing fee, leading to rejection of a timely filed answer. The defendants had filed a motion for relief from default before the default judgment was entered.

In *Gamet v. Blanchard, 91 Cal. App.4th 1276, 1284, 111 Cal. Rptr.2d 439, 445 (4th Dist., Div. 3, 2001),* the Court of Appeals reversed the trial court's refusal to vacate its dismissal of the complaint, finding that the court abused its discretion in not providing the self represented litigant – whose attorney had withdrawn from the case, who lived in South Dakota, and who was permanently disabled from an accident that shattered a disc in her neck – a further opportunity to prosecute her case despite her procedural defaults, which appeared to arise from her misunderstanding of court correspondence and court procedures.

In *Baske v. Burke, 125 Cal.App.3d 38, 177 Cal.Rptr. 794 (4th Dist., Div.1, 1981)*, the self represented defendant sent several hand-written letters to the clerk of the superior court. Though the letters contained

[4] Nelson v. Gaunt, supra, at 629, n1.

statements sufficient to constitute an answer to the complaint, the clerk of court merely placed them in the court record without bringing them to the attention of the judge. Even though her motion to set aside the default judgment was filed over six months after entry of the judgment, the trial court granted the motion to set aside. The Court of Appeals affirmed that decision, ruling that the failure of the clerk constituted extrinsic mistake providing a ground for the trial court to vacate the judgment.

Allowing liberal opportunity to amend

In *Harding v. Collazo*, *supra,* the Court of Appeals noted with apparent approval giving a self represented litigants multiple opportunities to amend his complaint to state facts sufficient to constitute a valid claim for relief.

Assisting the parties to settle the case

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeals noted with apparent approval the trial court's advising the parties on efforts to compromise the case.

Granting a continuance sua sponte on behalf of the self represented litigant

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeals noted with apparent approval the trial court's granting a continuance to allow the self represented litigant an opportunity to obtain counsel. In *Taylor v. Bell, supra,* the Court of Appeals affirmed the trial court's sua sponte vacating the submission of a case following trial and setting the matter for further hearing to allow the self represented litigant to call a witness.

Explaining how to subpoena witnesses

In *Taylor v. Bell, supra,* the Court of Appeals noted with apparent approval the trial court's advising the self represented litigant of her right to subpoena witnesses.

Explaining how to question jurors and exercise peremptory challenges and challenges for cause

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeals noted with apparent approval the trial court's instructing the

self represented litigant concerning the use of peremptory challenges and the examination of potential jurors to identify cause for challenges.

Explaining the legal elements required to obtain relief

In *Pete v. Henderson, supra note 3,* in a portion of its opinion not disapproved by the Supreme Court, noted that "one of the chief objects subserved by a motion for nonsuit is to point out the oversights and defects in plaintiff's proofs, so he can supply if possible the specified deficiencies." *124 Cal.App.2d 487, at 491.*

Explaining how to introduce evidence

In *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles, supra,* the Court of Appeals expressed approval of the "customary practice" of the trial judge's making suggestions to assist a self represented litigant in the introduction of evidence. In *Nelson v. Gaunt, supra,* the Court of Appeals noted with apparent approval the trial judge's explaining the proper procedure for admission of evidence, in the presence of the jury. The trial judge in that case also met with the self represented litigant and opposing counsel each day prior to the seating of the jury to discuss anticipated testimony and evidence, and any objections that might be appropriate.

Explaining how to object to the introduction of evidence

In *Nelson v. Gaunt, supra,* the Court of Appeals noted with apparent approval the trial judge's explaining the proper procedure for objecting to opposing counsel's introduction of evidence.

Explaining the right to cross examine witnesses presented by the opposing party

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeals noted with apparent approval the trial court's advising the self represented litigant concerning her right to question opposing witnesses.

Calling witnesses and asking questions of them

In *Taylor v. Bell, supra,* the Court of Appeals noted with apparent approval the trial judge's calling the self represented litigant as a witness and posing questions to her.

Sua sponte admonishing the jury on behalf of a self represented litigant to disregard statements of witnesses

In *Nelson v. Gaunt, supra,* the Court of Appeals noted with apparent approval the trial judge's sua sponte admonitions to the jury.

Preparing jury instructions for a self represented litigant or requiring opposing counsel to do so.

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeals noted with apparent approval the trial court's preparation of instructions for the self represented litigant. It explicitly affirmed the trial court's requiring opposing counsel to provide the litigant with the jury instructions that would usually be submitted by the plaintiff.

Limitations on the trial judge's actions in accommodating the needs of self represented litigants

A judge "is not required to act as counsel" for a party conducting an action in propria persona, *Taylor v. Bell, 21 Cal. App.3d 1002, 1009, 98 Cal.Rptr. 855 (1971),* and is not allowed to do so, *Inquiry Concerning Judge D. Ronald Hyde, No. 166, Commission on Judicial Performance.*

One of the counts in the Commission's removal of Judge Hyde from office recounted an incident in which the judge became the advocate for a party. The judge observed a defendant in court for arraignment on a misdemeanor domestic violence case gesturing to his wife, who was sitting in the audience, that he was going to slit her throat. The judge ordered the man removed from the courtroom. On the date of his next court appearance, the judge spoke with the wife, who told him that she was filing for dissolution of the marriage and wanted to serve her husband that day. The judge went with the wife to the clerk's office, assisted her in filling out a fee waiver petition, went to the office of the Commissioner responsible for reviewing such petitions and ensured that it got immediate attention, carried the signed fee waiver petition to the clerk's office where the dissolution petition was filed and a summons issued, and took the summons and petition to his own deputy who served them on the husband before he was transported back to the jail. The Commission concluded that the judge's behavior had "embroiled" him in the matter, evidenced a lack of impartiality, and constituted prejudicial misconduct.

The Supreme Court and the Commission on Judicial Performance have, on numerous occasions, disciplined judges or removed them from office for their denial of the rights of unrepresented litigants appearing before them.

In *Kennick v. Commission on Judicial Performance, 50 Cal.3d 297, 787 P.2d 591, 267 Cal. Rptr. 293 (1990)* the Supreme Court removed a judge from office for, among other things, rudeness to pro per litigants in criminal cases.

In *McCartney v. Commission on Judicial Qualifications, 12 Cal.3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974)*, the Court censured a judge for, among other things, bullying and badgering pro per criminal defendants.

In *Inquiry Concerning Judge Fred L. Heene, Jr., No. 153 (Commission on Judicial Performance 1999)*, the Commission censured a judge for, among other things, not allowing an unrepresented defendant in a traffic case to cross-examine the police officer and failing, in a number of cases, to respect the rights of unrepresented litigants.

In *Inquiry Concerning a Judge, No. 133 (Commission on Judicial Performance 1996)*, the Commission censured a judge for, among other things, pressuring self represented litigants to plead guilty, penalizing a self represented litigant who exercised his right to trial, and conducting a demeaning examination of an unrepresented litigant.

A trial judge may not deny the parties their procedural due process rights by pre-empting their ability to present their case. In *Inquiry Concerning Judge Howard R. Boardman, No. 145 (Commission on Judicial Performance 1999),* the Commission concluded that Judge Boardman committed willful misconduct by depriving the parties of their procedural rights in *King v. Wood.* The case involved a quiet title action concerning a home filed by a self represented litigant. The opposing party was represented by counsel, who was trying his first case. Judge Boardman called the case for trial and, telling the parties that he was proceeding "off the record" and without swearing the parties, asked them to tell him what the case was about. The self represented litigant spoke, followed by the lawyer's opening statement and his client's statement. The judge alternated asking the parties questions. He reviewed documents presented to him. After asking if either party had anything else to add, he announced that he was taking the case under submission and asked the attorney to prepare a statement of decision and judgment, which the judge later signed.

The Commission concluded that Judge Boardman, on his own initiative and without notice to or consent by the parties, followed an "alternative order" in a "misplaced effort to conserve judicial resources." It noted that the parties were denied their rights to present and cross examine witnesses and to present evidence.

Limitations on a trial judge's refusal to accommodate the needs of a self represented litigant

The federal courts and some state courts recognize affirmative duties on the part of trial judges to accommodate the needs of self represented litigants, such as a duty to inform a litigant how to respond to a motion for summary judgment. *Hudson v. Hardy, 412 F.2d 1091 (D.C Circuit 1968); Breck v. Ulmer, 745 P.2d 66 (Alaska 1987).*[5] California's appellate courts have not, to date, articulated any such affirmative duties. They have considered all such actions to fall within the discretion of the trial judge and have consistently affirmed a trial judge's refusal to exercise such discretion to provide assistance to a self represented litigant in the courtroom. The Court of Appeals has upheld a trial judge's refusing to advise a self represented litigant how to introduce evidence in the face of the "dead man's statute," *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles, supra,* refusing to advise whether the litigant had a right to depose a witness, *Taylor v. Bell, supra,* failing to prevent opposing counsel from committing prejudicial misconduct in his arguments to the jury, *Nelson v. Gaunt, supra,* and failing to grant a third opportunity to amend a complaint, *Harding v. Collazo, supra.*

A self represented litigant will not be allowed to contest the propriety of a judicial accommodation that s/he requested

In a criminal case, *People v. Morgan, 140 Cal.App.2d 796, 296 P.2d 75 (2d Dist, Div. 2, 1956)*, the court ruled that only the judgment and stay of execution from the court file related to a prior conviction would

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[5] The U.S. Supreme Court has decided two recent cases raising the issue of a federal trial judge's affirmative duty to provide information to a self represented litigant, imposing such a duty in *Castro v. United States, 124 S.Ct.786 (2003)* and refusing to impose a duty in *Pliler v. Ford, 124 S.Ct. 2441 (2004).* In *Castro* the Court held that a federal district judge must inform a prison inmate when the judge proposes to recharacterize a Fed. R. Crim. P. 33 motion (which is not cognizable) as a motion under 28 USC Section 2255 (which is cognizable, but would cause any future Section 2255 motion to be subject to the restrictions on "second or subsequent" such motions) and give the litigant the opportunity to withdraw or amend the motion. In *Pliler* the Court held that a federal district judge does not have a duty to inform a habeas corpus petitioner of all the options available to him before dismissing a petition that included both exhausted and unexhausted claims (claims in which the petitioner had and had not exhausted all available state court remedies).

be admitted into evidence. The defendant then moved to introduce the entire file into evidence. The judge advised him that "there are matters in that file that are very detrimental to you." The defendant nonetheless insisted that the entire file be introduced into evidence. The court did so. On appeal, the defendant claimed that admission of the entire file was reversible error. The Court of Appeals quoted *People v. Clark*:[6]

> 'But by electing to appear *in propria persona* a defendant cannot secure material advantages denied to other litigants. Certainly one appearing *in propria persona* cannot consent at the trial to the introduction of evidence, after first introducing the subject matter himself, and thus invite the introduction of evidence to rebut the inference he was trying to create, and then be permitted on appeal to complain that his invitation was accepted.'

Note that the Court of Appeals did not criticize the judge's advice to the defendant that the file contained information detrimental to his case.

[6] 122 Cal.App.2d 342, 349, 265 P.2d 43 (?).